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The Effect of British Intrusion on the Customary Law of Bantu Africa

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THE EFFECT OF BRITISH INTRUSION ON THE CUSTOMARY LAW OF BANTU AFRICA

by

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Charles Jeremy Curtoys

I: INTRODUCTION

Western man has great pride in his political institutions, which with some justification he holds to be the first to recognize the rule of law as superior to the rule of men. Thus it was with great confidence in his laws and the rectitude of his ways that the first Europeans occupied Africa. The impact of this invasion upon the indigenous populations of Africa was tremendous. Every facet of African life, its social, political, economic and legal systems were affected.

A study of Bantu customary law has to depend largely on secondary material, because until recent times, the law of Bantu Africa* was largely unwritten. A number of monographs have been written by anthropologists in the field, but few of them give more than a chapter to an examination of the laws and their power of sanction as exercised by the courts. Yet it is the courts that are the precursors of legislation, and ultimately, legislation is the province of the state.[1] "It was the court really that launched the

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*Bantu, for the purpose of this paper, refers to the group of people of Southern Africa whose language is a member of the Bantu linguistic group. Examples and supporting evidence for the paper will be drawn from among the Tswana, Sotho, Barotse, Kikuyu and Thonga with occasional references to the Pondo and the Yao.

[1]Henry Sumner Maine, Ancient Law (New York: Henry Holt and Co., 1888), p. 4ff.

'state' for it was in the court that the sentiment of etatism, with all its devotion and loyalties, was first nurtured."[2]

To do full justice to the topic at least minimal field work is necessary. As this is not a reasonable possibility at the present time, I am offering the following as a tentative thesis pending verification in the field. To narrow the focus, I am using examples from certain selected tribal groups as listed below. Due to the nature of the sources, all the evidence centers on territories that have at one time or another been subject to British dominion. This is not a limitation, however, for should one become involved with any of those territories colonized by the Belgians or French, for example, they would be forced to introduce comparisons between the British Common Law and the Roman Civil Codes, as used by the latter. Such comparisons would only cloud the main issue.

The intrusion of the European into Bantu Africa often had a destructive effect upon the laws and customs of the people. In spite of this however, the Customary Law of Bantu Africa was to prove resilient, and still remains a potent force--though with modifications--in the emerging nations of Bantu Africa today.

The paper is divided into four major topics, all of which bear on the main theme, which is to determine the impact of an alien system

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[2]William Seagle, The History of Law (New York: Tudor Publishing Company, 1946), p. 65.

of law upon an indigenous one: first, to understand the nature and function of law in society in general; secondly, to discuss some of the ways in which the alien European has introduced alternative legal principles into Africa; third, to examine some of the forces which have tended to undermine traditional law, forcing it to adapt to changed conditions or die out if unable to do so; and fourth, to examine the status of law in Bantu Africa today.

II: THE NATURE OF LAW

A person in a society which prides itself in the law by which it was created and to which it adheres should have no difficulty in discussing the nature of law. Yet when one is faced with this proposition, the task seems to be almost impossible, if not highly presumptuous, especially when one is not even trained in the discipline. There is no way to evade the issue, however, so that in the manner of "fools," one has to march in where even lawyers fear to tread. Though few practitioners have themselves answered the question "What is Law?" to their satisfaction, there are many who have done a very adequate job, and it is to them that recourse will be taken.

The definitions which follow come from a variety of sources spanning a considerable distance in time. There are several reasons for such an approach. First, the law is not something which just happened overnight. It is a dynamic phenomenon which has been evolving since the beginning of human experience and even before that if one regards the law of nature as law. Secondly, there have been two major schools of thought in the western world regarding the origins of law, and these will become evident in the series of definitions which will shortly be recorded. Finally, the law is so

complex an entity that one cannot begin to comprehend its nature unless one can see it through the eyes of many observers over a long span of chronological time.

The law is like a maze--it consists of numerous intertwining parts, and its essence is not easily isolated or understood. For every definition, and definitions though restricting are a necessary part of the law, there is an exception which must be accounted for. Similarly, for every legal opinion there may be an equally valid dissent and each is a part of the law. Such factors are of special importance in literate societies where the body of rules governing that society are enshrined for all time as a matter of record; but they should not be overlooked when pre-literate societies are under consideration. For though the latter may not record their laws, judgments and variant decisions in writing, they do nonetheless carry as much weight when carried down orally as they would if written, and are enforced by the authority of the elders or chief, depending on the political make-up of the society in question. These matters will again be alluded to in a later chapter when they will be discussed in greater detail. For the present it is sufficient to note that the law is being considered as a whole without particular regard to its source, be it written or unwritten.

Because Western law owes its origins primarily to the Greeks and Romans, it is from them that the earliest examples are

drawn. These writers saw the law as divinely inspired, immutable and incontrovertable.

> There is in fact a true law--namely right reason--which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law, and it requires no [great lawyer] to expound and interpret it. It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment.[1]

This has also been expressed as follows:

> The law is that which all men ought to obey for many reasons, but above all because every law is an invention and gift of the gods, a tenet of wise men, a corrective of errors voluntary and involuntary, and a general covenant of the whole state, in accordance with which all men in that state ought to regulate their lives.[2]

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[1] Cicero, "On the Commonwealth," (trans. Sabine and Smith, 1950), pp. 215-216, in The American Legal System: Its Dynamics and Limits by Stephen Ford, (St. Paul, Minn.: West Publishing Company, 1970). pp. 3-4. I am indebted to Stephen Ford for this historical analysis of the law, from which the next six definitions are also taken.

[2] Demosthenes, "Oration against Aristogition," (1935), p. 525, in Ford, p. 4.

Pursuing the natural aspects of the law still further we note the comments of another in the fourth century B. C. who remarked:

> By 'particular' law I mean that which an individual community lays down for itself . . . ; and by 'universal' law I mean the law of nature. For there is a natural and universal notion of right and wrong, one which all men instinctively apprehend . . .[3]

The moral or natural aspects of the law, as though God given, were still of great importance during the seventeenth century and inspired such definitions as, "Law is a rule of moral action obliging to that which is right."[4] Only with the nineteenth century did man begin to see the law in the way that he does now, namely as a "rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."[5] Yet even this has a slight tinge of the moral about it, which was not to be removed until our own century when law has been defined as " . . . the sum of the compulsory rules in force in a State."[6]

The above definitions give some idea what the law is, but what it does may be even more significant and certainly easier to understand.

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[3] Aristotle, "Rhetoric 1373 b." (Cooper trans. 1932), p. 73, in Ford. p. 2.

[4] Grotius, "De Jure Belle as Pacis," (1625), p. 1, in Ford, p. 4.

[5] Blackstone, "Commentaries," (1847), p. 44, in Ford, p. 3.

[6] von Jhering, "Law as a Means to an End." (1914), pp. 239-240, in Ford, p. 5.

> This doing of something about disputes, this doing of it reasonably, is the business of the law. And the people who have the doing in charge, whether they be judges or sherriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself.[7]

Everyone at some time or another comes in contact with the law. All can agree therefore, that it has some effect on their lives, whether they choose to obey or disobey it. For if they choose the latter, they are forced to suffer the consequences.

> A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.[8]

There is another side to the law, however, a more positive aspect. For just as a citizen is expected to obey the law, so too he may use it to redress a wrong committed against his person or property.

> When a citizen sues another citizen in a court, he is not obeying the law, he is invoking the law as the basis of his claim, and he is using the law--legal procedures--to establish the validity of his claim.[9]

We can see, therefore, that the law falls into two major categories: the one prescriptive--what one may or may not do--which is normally invoked by some constituted authority (government, state, or chief),

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[7] Llewellyn, "The Bramble Bush," (1930), p. 3, in Ford, p. 5.

[8] E. Adamson Hoebel, The Law of Primitive Man, (Cambridge: Harvard University Press, 1954), p. 28.

[9] Charles G. Howard and Robert S. Summers, Law: Its Nature, Functions and Limits (Englewood Cliffs, New Jersey: Prentice Hall, 1965), p. 3.

and is generally referred to as the criminal law; the other essentially descriptive, which may be invoked by almost anyone, and is commonly referred to as the civil law. While the above is a reflection of the view of "Western" man, the African does not differ much in his interpretation of the question "What is law?" An advocate of the Nigerian bar has said: "The law of a given community is the body of rules which are recognized as obligatory by its members."[10] Put another way, the law is a means to an end, and its function is primarily to balance interests.

An issue causing some argument and misunderstanding in a discussion of the nature of law is the distinction sometimes made between custom and law. On occasion, when the traditional law of a people is under discussion, commentators will tend to downgrade it by dismissing it as being merely customary, as though that were an inherent fault. To do this, however, is to misunderstand the place of custom in the lives of people everywhere, as well as the formation and development of the law.

> Law and custom are so closely inter-related that it is sometimes difficult to distinguish between the two, but broadly speaking the term law is applied to the appointed rules for the control of, and sanctioned by, a community. Custom, on the other hand, is long established usage, or a practice which has become habitual and has legal sanction.[11]

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[10] T. O. Elias, The Nature of African Customary Law (Manchester: Manchester University Press, 1956), p. 55.

[11] G. M. B. Whitfield, South African Native Law, 2nd ed. (Cape Town: Juta, 1948), p. 1.

Marriage provides a useful analogy to distinguish between custom and law. It is customary in Western society to have a wedding ceremony of some sort either in a church or a home followed by a reception with food, drink, dancing, and much revelry. It is the law that a marriage certificate be issued by a duly constituted authority at the time the ceremony is performed, without which the marriage would not be legal. Thus one can say that laws are rules imposed on society as a whole with the weight of legal sanction to support them; whereas customs, though possibly no less regulatory in their influence on peoples' lives do not have the backing of legal sanction. Once they do, however, they can correctly be regarded as laws. Looked at in this way, there need be no confusion as to what is law and what is custom, and no need to distinguish between the two, downgrading the one at the expense of the other, for they represent two sides of the same coin. Custom is more nearly a state in the evolution of the law, a continuing and dynamic process, than an alternative phenomenon.

> The modern age of legislation by means of laws deliberately set up and expressed in certain authoritative texts covers but a very small period of legal history. Preceding it the principle element in most legal systems was custom.[12]

Another commentator has taken this line of thought even further, by

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[12] Theodore F. T. Plucknett, "A Concise History of the Common Law" in Readings in Jurisprudence, ed. Jerome Hall (Indianapolis: The Bobbs Merrill Company, 1938), p. 875.

suggesting" . . . that to which we give the name Law always has been, still is, and will forever be custom." At the same time he cautions that though all law is custom, not all custom is law. "Law differs from custom as a part differs from the whole."[13]

This short summary of some of the major definitions of law is by no means to be regarded as the last word on the subject. There are many learned writers whose definitions have not been included; but those that are should provide an adequate framework for an examination of the next topic under discussion, namely, the nature of African Customary Law.

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[13] James C. Carter, "Law: Its Origin, Growth and Function" in Readings in Jurisprudence, ed. Jerome Hall (Indianapolis: The Bobbs Merrill Company, 1938), p. 912.

III: THE NATURE OF BANTU CUSTOMARY LAW

The function of the law in Bantu society, as in any society, is to preserve and maintain equilibrium.[1] This aim is carried to such an extent that punishment for wrongdoing, a strong feature in our own law, is generally given less importance than retribution of the anti-bellum status of the two litigants. Thus in African law one very often finds that emphasis is placed upon compensation for a crime committed rather than on the punishment of the offender. Let us assume, for example, that a man kills another in a fight. The homicide is clearly not premeditated, yet still a serious crime. In our society the murderer would inevitably be tried and if convicted, would serve a lengthy prison term. Not so under African Customary law. More likely, he would be required to pay a fine of from 10-30 cows or 100 sheep or goats to the family of the deceased as compensation for their loss. Should the victim be a woman (at least in Kikuyu customary law) the fine would likely be three cows or 30 sheep, women evidently being regarded as being less valuable

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[1] J. H. Driberg, "Primitive Law in Eastern Africa," Africa: Journal of International Institute of African Languages and Cultures, (1929), p. 49.

to the community.[2] If, however, the murder can be proved to be pre-meditated the murderer might be executed. Most traditional Bantu societies, however, considered the taking of a life for a life a wasteful process, so that more often compensation was paid to the chief or elders. This principle was based on the idea that "all blood belongs to the chief."

The Bantu by their nature are litigous people. It may be that all people are naturally so, though a traveler to southern Africa today who happened to spend any time at all in the rural areas would soon, without any prior knowledge or experience, surmise that the propensity for peaceful discussion and argument until a question is solved is high amongst the Bantu. Such attributes, the desire for and enjoyment of healthy protracted argument, are the basis of litigation. This being so, it is not surprising that meetings of "the court," no matter what form it took, were well attended. It would in fact probably be fair to say that the proceedings of the courts occupied in Bantu Africa the same place as the television set does in modern America. It was not only the source of information for the people as to what was right and what was wrong in terms of the law, but also an opportunity for a gathering during which men could discuss their problems, the crops, their plans for the future, and

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[2] Jomo Kenyatte, Facing Mount Kenya (New York: Vintage Books), p. 219.

so forth. This kind of inclusive attitude towards their legal institutions and by implication, the laws which they enforce, is important. It instilled in the African a great respect for the law, the kind of respect which is only possible when the law is an organic entity, coming from below out of a common need shared by all the people, for its power of unification and sanction. For in Bantu society, as in any other, a law without sanction is no law; and by the same token the sanctioning power of a law is not long effective if it is not supported by the consent of the people whom it controls.

A leading writer in the field of African law who has studied the operation of the Law among the Bantu people of Northern Rhodesia, now Zambia, has suggested that the concept of the "reasonable man" is central to the law of the Barotse.

> The reasonable man occupies this central position because he is the means by which abstract legal rules are focused on to the varied circumstances of life.[3]

Though it can be dangerous to infer general trends from particular instances, in this case, it appears tenable to suggest that the "reasonable man" is the centre of all legal systems, including those of the Bantu people, of whom the Barotse are a part. It has been said that:

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[3] Max Gluckman, Order and Rebellion in Tribal Africa, (New York: Free Press of Glencoe, 1963), p. 179. Reference should also be made to his The Judicial Process Among the Barotse of Northern Rhodesia (Manchester: The University Press, 1955); and to The Ideas in Barotse Jurisprudence (New Haven: Yale University Press, 1965).

> There has never been a problem, however difficult, which His Majesty's judges have not in the end been able to resolve by asking themselves the simple question, "Was this or was it not conduct of a reasonable man?", and leaving that question to be answered by the jury.[4]

So too in Bantu society, one can assume that whenever litigation takes place, provided that the action of the defendants are judged according to that societies conception of "reasonable behavior," then the decisions reached by the judges will be accepted and enforced. This is borne out by Max Gluckman who said:

> In almost every case which I heard in Barotseland litigants and witnesses, whether they lied or were mistaken, worked with the same moral and legal rules as the judges did. This is the mark of a homogeneous society; and it alone allows a satisfactory process of the law.[5]

This introduces the problem of morality and the law. Again the Barotse, and therefore by implication the Bantu, appear to have a very sophisticated view on the matter. A Barotse maxim states: "If you are invited to a meal and a fishbone sticks in your throat, you cannot sue your host."[6] This is closely analagous to the Roman law injunction of " . . . volenti non fit injuria," which may be freely translated to mean: a man who willingly exposes himself to danger, cannot sue for damages if he is subsequently injured.[7] In other

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[4] Sir Alan Herbert, quoted in: Max Gluckman, . . . Order and Rebellion, p. 179.

[5] Gluckman, p. 182.

[6] Ibid., p. 197.

[7] Ibid.

words the law seeks to impose right and reasonable action, whereas morality seeks right and generous action. And it is well for a man to be prodigal in meeting his obligations towards others, while at the same time not insisting on the letter of his rights.[8]

So far I have sought to demonstrate that the role of law among the Bantu people, with specific reference to the Barotse, is basically the maintenance of stability in society, which differs little from our own. There are, however, some variations; and as these primarily concern matters of procedure, it is to this aspect of the law that I shall now turn.

In the first place there was seldom a structure which could be called a "court house." In Barotseland, it is true, the court might meet under some form of shelter, but generally a covenient spot close to the headman's or chief's hut was sufficient. A large shade tree, for instance, under which the elders might meet to discuss the affairs of the village or tribe was often a typical venue, but whenever the chief or elders or judges (depending on the tribe in question) convened the court, there the court was established. Among the Barotse there was a sophisticated system of courts from the highest or chief's court down to the lowest village courts. The higher level courts, such as that of the Paramount chief, were held under cover, but the village courts presided over by the headmen were normally held in

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[8] Ibid., p. 192.

the open.[9] Among the Tswana trials were held in the open and in public, but women were not normally allowed to attend unless directly involved.[10] The Sotho are reported as having had as many as 1300 courts of one sort or another, ranging from the relatively informal gatherings of headmen and a few advisers up to the "Supreme Court" of the land presided over by the Paramount Chief and divided into five permanent courts which sat at Matsieng, and as many as three on circuit.[11] The Paramount chief of the Thonga was responsible for all legislative, executive and judicial powers which he enacted with the aid of several counselors. He was the supreme authority of the nation and his decisions were without appeal.[12]

The above being all examples of chiefly societies, it is well also to consider an acephalous society. The Kikuyu preferred to settle all minor disputes in the home, and only if the father with the aid of arbitrators--normally the plaintiff's kinfolk--was unable to bring about an equitable settlement in the case, was it referred to the general assembly or public court of elders.[13]

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[9] Gluckman, The Judical Process among the Barotse, Chap. I.

[10] Isaac Schapera, A Handbook of Tswana Law and Custom, 2nd ed. (London: Oxford University Press, 1955), pp. 287-288.

[11] Hugh Ashton, The Basuto, 2nd ed. (London: Oxford University Press, 1967), p. 222.

[12] Henri A. Junod, The Life of a South African Tribe, Vol I: Social Life (New York: Union Books Inc., 1962), p. 434.

[13] Kenyatta, pp. 205-206.

The manner of presenting a case at court did not vary much between societies, whether chiefly or acephalous. Of the latter it was merely said that the court of elders would meet at the request of the plaintiff to hear the case. The plaintiff would state his case using twigs to keep a record of the points he had raised which in effect was the court record. The defendant would answer these claims point by point. Once complete, the ndunda or judgment committee would declare its judgment, and if both parties agreed the case was closed.[14] Likewise, among the Tswana, a typical chiefly society, the plaintiff's responsibility was to open the case by bringing it before the court, though in much the same way as among the Kikuyu, he was expected first to attempt a settlement out of court.

Fairly standard procedure among all societies was the hierarchy of the courts. Thus a case had to be heard at the village level by the headman or the village elders before it could be moved on to the chief's court, and then only if satisfaction was not achieved at the lower level.[15] Neither party was expected to make any kind of oath, but both were expected to tell the truth. Among the Sotho it was said of a lying witness: "The questions have defeated him."[16] Perjury, however, was not regarded as a grave crime, though it

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[14] Kenyatta, p. 208.

[15] Schapera, p. 285.

[16] Ashton, p. 242.

may have been punished by the imposition of a fine. Once the plaintiff had introduced his case, which he might do at great length, calling on witnesses to bear out his testimony, the time was handed over to the defendant who would generally deny the whole story, providing all kinds of alibis to prove his innocence. Professional advocates were rarely a feature of traditional Bantu court proceedings, though there are records among the Sotho of wealthy litigants hiring professional pleaders. These men, known as akhente, were a rare innovation and "contrary to traditional practice and theory."[17] In fact among the Pondo, advocates were villified and called igqwetha, which freely translated means perverter of the truth.[18] Despite the lack of advocates, however, cross-examination was both vigorous and thorough. When both the plaintiff and the defendant had stated their cases, the judges would examine the witnesses. Eye-witness accounts were always given greater weight than hearsay evidence, though the latter was also admissible. Following the cross-examination of witnesses, which in Kikuyu courts was carried out by two elders appointed by the court, anyone was allowed to join in the discussion.[19] Then, once all the evidence had been heard and

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[17] Ibid., p. 234.

[18] Monica Hunter, Reaction to Conquest: Effects of Contact with Europeans upon the Pondo of South Africa, 2nd ed. (London: Oxford University Press, 1961), p. 426.

[19] Kenyatta, pp. 211-212.

discussed, a committee of elders was appointed to decide the case. Each litigant could choose two elders to represent them on this committee. Various curses and ritual oaths were taken by both parties to ensure that the judgment of the kiama (court) would be respected and obeyed.

> The fear of public opinion expressed in the way of curses was the chief preventative of mischief and crime, because there was no police organization in the Gikuyu society.[20]

Not only were the litigants expected to take these oaths, but so were the judges.

> . . . Oath or ordeal was the most important factor controlling court procedures. It served two purposes. On the one hand, the fear of it prevented people from giving false evidence, and helped to bring the offenders to justice through guilty conscience and confession. On the other hand, it ruled out bribery and corruption and ensured impartial or unbiased judgment.[21]

While it will be noted that among the Kikuyu an oath was administered, it was not quite in the manner of a witness promising to tell "the truth, the whole truth, and nothing but the truth," but rather a more inclusive one which involved the whole court, judge and judged alike.

Just as the procedural aspects of the law of the Bantu societies examined are more flexible than those of the European societies which were later to colonize Southern Africa, so too, the substantive elements of their laws seem to be simpler and in their simplicity more

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[20] Ibid., pp. 212-214.

[21] Ibid.

equitable. It has been seen, for instance, that greater emphasis was placed upon restitution and compensation than punishment even with regard to capital crimes. The Thonga, like all the other Bantu societies referred to, make a distinction between premeditated and accidental murder. The former was generally, though not always, settled by the execution of the murderer. However, should the offender commit his crime involuntarily, his offense could normally be ameliorated by presenting a girl from his family (a daughter, niece, or sister) to the bereaved family. Should the girl subsequently produce a child, thus restoring the balance between the two families, she was free to return home. If, as sometimes happened, a member of the family of adoption wished to marry her, then lobola or bride wealth had to be paid. Thus, ". . . a cow which has calved is not used to pay a fine; the calf pays it."[22]

With this kind of an outlook on capital crimes, especially murder, it is not surprising to find that the Bantu people have an essentially "reasonable" substantive means of dealing with theft. The Thonga, and in this respect they are not atypical, condemn theft not so much for being anti-social, but as being disrupting to society. The concept of individual property is at the base of the entire Bantu system. They are agriculturalists and consider the products of their labour to be their own, to which no one else is

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[22] Junod, pp. 441-442.

entitled without prior permission. Yet, if a man is hungry and in passing a field of mealies* happens to take one to roast and eat before going on his way, he is not considered guilty of theft by the Thonga, provided he leaves some sort of mark. An example is cited in which a fellow took a mealie cob from the field of his friend, but before leaving drew a line in the earth from the site to the edge of the field, there leaving the now useless stalk. Of him it was said: "A thief leaving hastily would not have time to draw the line . . ." and he was not prosecuted.[23] Where a theft was proven intentional however, the offender would be ordered to pay compensation to the offended, equal to the value of the goods stolen.

In some societies, i. e. Kikuyu, perpetual thieves were treated very harshly, even to the extent of being publicly executed by stoning or burning, for in Kikuyu society at least, recidivism was regarded as very dangerous to society.[24] Recidivism was treated with less violence among the Sotho, who would merely impose an additional fine of ten head of stock on the habitual criminal which, if he was unable to pay, resulted in his being summoned before the the court of the Paramount chief.[25]

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*corn on the cob

[23] Ibid., p. 446.

[24] Kenyatta, p. 221.

[25] Ashton, p. 267.

Sorcery was the most heinous of crimes in the Bantu hierarchy, superseding even murder, because none was considered more socially disruptive. Magic, on the other hand, was usually sanctioned by the law as a means of determining the guilt of an otherwise unapprehendable criminal. The Tswana distinguished between sorcerors, baloi, and professional magicians, called dingaka. The latter were and still are looked up to as useful members of society. Sorcerors, however, who were usually women, were regarded as evil and the perpetrators of evil. Thus fell to the magicians the task of identifying the sorcerors so that they could be rooted out. Take the example of a man who has fallen ill. A magician would be called in to determine the cause of the illness. Should sorcery be suspected, the magician would describe the totems by which the sorceror could be identified, and once found he/she would be called in to make the man well again. Failure to do this would result in a sentence of death for the suspected sorceror.[26] No aspect of Bantu law has been more misunderstood than the part played by "witchcraft," and the rationale of punishment underlying it. Just how misunderstood it was, and the results that this was to have upon the law once the European got his hands on it will be dealt with at greater length in the next chapter.

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[26] Schapera, pp. 275-278.

Personal law, specifically the marriage law, is the next topic for examination. It has been said that in African society:

> Marriage . . . is a contract ostensibly between two families, in which the individual interests of the groom and bride, though implicitly or formally recognized, are but a subordinate element of the wider dominating interests of their families . . .
>
> An African contract of marriage is in fact a triple agreement. First, there is the primary, legal contract between the boy and girl as the only true partners to the marriage relationship. Then, there is the secondary, social contract between the two families of the couple. Finally, there is the ancillary, socio-legal contract for the settlement of the marriage payment which puts the seal of enforceability on the entire transaction.[27]

The socio-legal contract, severally known as bride-prince, bride-wealth, or lobola, is another feature of African (Bantu) custom, which with time has developed the attributes of law and has been totally misunderstood by Europeans, especially missionaries. Far from being a transaction by which the body of the bride was purchased, it had the function of first, legitimatizing the union, and secondly, compensating the bride's parents for their loss. To understand the significance of the latter one must realize that in Bantu society there existed a definite division of labor between men and women, the latter being responsible for agricultural production. Thus the loss of an able-bodied daughter might be serious in the context of of the extended family unless some form of compensation was received.

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[27] Elias, pp. 146-148.

Among the Tswana adultery was generally settled out of court, but if pregnancy resulted, then the offender was usually fined, and the husband had custody of the child. In order to be awarded compensation, however, the husband had to catch his wife's lover red-handed. Further, though a husband could exact a confession from his wife, his case was regarded as unfounded if he had been away from home for any length of time, for example, more than two years. Should an unmarried girl be seduced and subsequently become pregnant, her lover would be subject to a heavy fine equivalent to the lobola price, which was payable to the girl's father as compensation for his loss. An unmarried girl who has already borne a child carried a far lower brideprice than a virgin. But if the girl failed to report her seduction immediately, thus indicating that she had enjoyed and/or encouraged it, the fine imposed would likely be considerably reduced.[28]

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[28]Schapera, pp. 264-268.

IV: THE BRITISH IMPACT UPON THE BANTU CUSTOMARY LAW

The primary impact of the British upon the Bantu customary law was in the overt imposition of their own codes and common law on the peoples whom they conquered. In South Africa for instance, Roman-Dutch law was imposed from an early date by the first settlers. This form was maintained by the British following the annexation of the Cape Province and was taken into Rhodesia nearly eighty years later. The same was true to a lesser extent for the former Protectorates, notably Botswana and Lesotho. At the same time the British also introduced their own common law, so that now one has over a considerable part of Southern Africa what has been described as a form of Anglo-Roman-Dutch-Common-Law, or a common civil-law.[1] Meanwhile, in keeping with the British policy of Indirect Rule, the native customary laws were as far as possible preserved.[2] They were to be used whenever applicable, in cases involving parties who were both Africans, and only as long as such laws were "not

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[1] A. N. Allott, "Towards the Unification of Laws in Africa," The International and Comparative Law Quarterly, XIV (1965), p. 372.

[2] The concept of indirect rule was first formulated by Lord Frederick Lugard and became the official policy of all British administrations in colonial Africa. Putting it crudely, indirect rule meant: divide and rule.

repugnant to natural justice, equity, and good conscience."[3] This dual concept of the law, one for the whites and one for the blacks, is still the subject of much controversy among legalists in South Africa. A notable critic recently attacked this dual policy as one designed solely to perpetuate apartheid, being of no value whatsoever in promoting justice and equity for all subjects of the state.[4] His contentions were strongly challenged by another critic, who pointed out that the African, far from being discriminated against is given the benefit of the doubt. He is allowed to appear in a statutory court in the event that his case involves a member of another race, whereas the European is automatically barred from appearing in a traditional African court, no matter what the circumstances of the case are.[5]

Of almost as great an impact has been the influence of alien procedural methods upon traditional systems of law. In territories such as Botswana and Lesotho, but also Zambia, Rhodesia, and Kenya, statutory law was derived from enactments passed by local legislatures with metropolitan governments taking a back seat.

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[3] T. O. Elias, "Notes: Form and Content of Colonial Law II," The International and Comparative Law Quarterly, IV(October 1955), p. 534.

[4] R. S. Suttner, "Legal Pluralism in South Africa," Ibid., XIX (January 1970), p. 134-153.

[5] L. Lazar, "Legal Centralism in South Africa," Ibid., (July 1970), p. 492-507.

This law was largely administered by the colonial courts. A second body of subsidiary statutes were administered by the native courts, and were derived from rules made by Native Administrators acting under statutory authority. A final body of law emanated from the villages and native communities and was primarily administered by native courts in traditional fashion, but linked by appeal to the colonial courts. In this way control was effectively maintained in the hands of the colonial rulers.[6] Little has changed since independence, only now the power is in the hands of the locally elected African leaders instead of the alien colonial administrators, and the dual system still persists.

An excellent example of the kind of problem that arises out of the operation of a dual courts system is given in the case of Grobber vs Lisambo as reported in 1964.[7] The defendant, an African, while delivering meat to a certain household, was bitten by the plaintiff's dog. He had entered the property of the plaintiff in the hope of determining the whereabouts of the house he was seeking, by asking the plaintiff's servant for directions. The court of first instance, a multi-racial Local Court, found for the defendant, ordering the

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[6] Lord Hailey, An African Survey: A Study of the Problems Arising in Africa South of the Sahara, Revised, 1956, (London: Oxford University Press, 1957), p. 601.

[7] Philip A. Thomas, "J. B. Grobber v. J. Lisambo," The International and Comparative Law Quarterly, XVIII, (April 1969), p. 471-477.

plaintiff to pay damages amounting to three pounds (about $8). The case under review was the plaintiff's appeal, he was a white man, to the next highest court, which he won. Lisambo was ordered to return the $8 and pay costs. The problem is the age-old one of conflict of laws. The initial hearing was conducted according to Zambian Customary Law, in which the doctrine of strict liability applied to dog bite cases. The appeal was heard in terms of the English Common Law, in which the doctrine of scienter applies.[8] The appeal courts' ruling was predicated on the fact that they considered the lower court to have erred in failing to establish proof of scienter on the part of the plaintiff. Yet the lower court had acted in good faith and in terms of the Zambian law which states:

> A Local Court shall administer: a) The African Customary Law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.[9]

The application of customary law in this case would appear to be compatible with the above requirements. This, however, raises another issue. What if every time a case from a lower court is subject to review, the judge applied new and conflicting principles. Soon the

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[8]Note: The rule of scienter means that the intent to do harm must first be proved before liability can be established. In other words, unless Lisambo could prove that Grobber intended his dog to bite him, he had no cause.

[9]Thomas, p. 471.

lower courts would become redundant.[10] It is certainly a matter of record that in any kind of legal system the Higher courts and courts of Appeal have the last word, and in no way is it to be inferred that this should be otherwise; but where the Higher court is judging a case in terms of one concept of law and the lower court in terms of a totally different one, it is clear that sooner or later the two must be reconciled. This does, however, bring into sharp relief the disadvantage of operating a tiered system, which is a legacy of the colonial past. There appears to be no immediate solution for the problem either, though eventually some form of unity will have to be brought to the legal systems of these territories. Law can be the greatest social device for unifying a nation. African nations with what are often very artificial boundaries, caused by colonial regimes, and encompassing in many cases mutually hostile tribal groups, need the unifying aid of unified laws more than ever. There is no time to let these evolve, as they might ordinarily have done, so that government action is imperative.[11] Government action in earlier times created the division as a matter of policy, and only government action, it seems, can bring about the necessary re-unification.

Of great importance too, has been the imposition of laws governing witchcraft and the murder of suspected sorcerors, which

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[10] Ibid., p. 473.

[11] Allott, p. 366-369.

to the pre-literate African may be regarded as a public service, but to the European is still murder. Of witchcraft and sorcery it has been said: "They are not the exotic things in Africa that they are to us; they are perfectly practical, understandable forces that can be wielded to some extent by almost anyone."[12] Yet the European has relentlessly prosecuted all Africans found guilty of murdering suspected witches, which act the hapless plaintiff has seldom sought to conceal, thinking in his own way that what he has done was justified. The courts, meanwhile, continued to judge such offenders by standards normally applied to the "Reasonable Englishman," a patently unreasonable premise to judge a tribal African by. "One cannot assert dogmatically about custom that it is wrong. One can assert dogmatically that witchcraft is factually erroneous."[13] By adhering rigidly to English standards of morality and reasonable behavior, the courts have put many suspects in the invidious position of being judged and convicted for acts that they did not even regard as wrong, let alone criminal.

The problem surrounding the prosecution of witch-murder arises from a basic misconception on the part of the European

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[12] Colin Turnbull, The Lonely African (New York: Anchor Books, 1963), p. 159.

[13] Robert B. Seidman, "Mens Rea and the Reasonable African: The prescientific world view and mistake of fact." The International and Comparative Law Quarterly, XV (October 1965), p. 1139. (Mens Rea = The Criminal Mind.)

settlers and magistrates. They failed to appreciate or understand the distinction drawn in the African mind between sorcerors and magicians. There was no such thing as witchcraft, they reasoned, and killing a person for being a suspect was clearly a case of premeditated murder. It is not that the African condoned witch-murder. There was a long ritual of divination and extra-legal ritual that was gone through by the magician or diviner before the sorceror was exposed and even when this was done, the signs were often so oblique that it was hard to determine the guilt with any certainty.[14] Hence, no doubt a number of innocent lives were lost. Yet one cannot help but feel that a more understanding attitude on the part of the early settlers and law-makers would have ameliorated the situation earlier. Education, not law, was what the pre-literate African really needed to drive out his superstition. Neither should it be forgotten that even in England, which had regarded itself as civilized for centuries, suspected witches were hanged as late as 1735, and the last recorded hanging of a suspected witch in Western Europe was in 1782.[15]

One can see that the effects of the imposition of alien laws upon the Bantu have been threefold: first, by the introduction of alien codes, in this case Roman-Dutch and English Common-Law,

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[14] Elias, p. 228.

[15] Ibid., p. 127.

(these as already indicated, tending to merge and form a kind of Anglo-Civil Law); secondly, by the introduction of foreign and apparently complex procedural techniques, particularly with regard to the admissibility of evidence and the use of professional advocates; and finally, by legislation, especially in the role that the statutory colonial courts have played in prosecuting crimes against the state such as witchcraft and witch-murder.

Another influence that cannot be overlooked is that of the missionaries. In preaching against polygamy, bride price, and inheritance of widows, the missionaries attacked the very core of the "personal law" of the Bantu, around which most litigation revolved.[16] It cannot be stressed enough that the customary law of the Bantu was, and to a degree still is more "personal" than our own. Compensation and restitution are far more important to the African than retribution and punishment. In all society the maintenance of social stability is the prime aim of the law. In pre-European Bantu Africa one could say that it was the sole aim. Certainly, the concept of punishing a wrongdoer without restoring the ante-bellum balance, as it were, was completely foreign and seemingly pointless. To illustrate this, an African of the Yao people

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[16] Inheritance of widows, means that the brother of the deceased has the first option to marry his widow, and so take over his property. See Isaac Schapera, "The Development of Customary Law in the Bechuanaland Protectorate," The Future of Customary Law in Africa, Symposium--Colloque, (Leiden: Universitaire Pers, 1955), p. 106.

from Nyasaland, now Malawi, has said:

> We natives think that hanging is useless. Suppose I kill someone, I am hanged, and tomorrow you will hear that someone has again killed a man. The reason is this: when a man's heart has become swollen and he wants to kill, he will kill, without thought for God or Government. . .[17]

Sometimes one is forced to conclude that the African's "primitive" perception of a social problem is more enlightened than our own, tempered by a somewhat jaded world-view.

The policy to date of most colonial regimes and their successors, with regard to marriage, divorce, and bride-price, has been to recognize both the customary law and Christian teaching, supported by the common law and statutes. Thus a man can choose to marry under either convention and have his marriage recognized as legal. In fact, many in the past have compromised, and following a Christian ceremony, have paid bride-price in order to seal the contract and legitimatise the offspring. As far as polygamy goes, the impact of a changed economic system has been far more pervasive than the influence of the missionaries in reducing the incidence of this practice, if not eliminating it altogether.[18] Undoubtedly a major effect of the European occupation upon African society has

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[17] Margery Perham, Ten Africans, 2nd ed. (Evanston: Northwestern University Press, 1963), From the story of Amini Bin Saidi, pp. 146-147.

[18] Max Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia (Manchester: Manchester University Press, 1955), especially chapters III and VIII.

been the introduction of a cash economy. The need to participate in this, at first created by the imposition of taxes, like the hut-tax, and now largely by their own volition, has caused the African to leave his tribal home and seek employment in the cities, in the mines, and on European-owned farms. This has had several results, all of which have affected the development of the law and the African's view of its place in society and its power over him.

In moving from his home, often for extended periods of time, he has met many people with different backgrounds and ideas. In many instances he has left behind a wife and dependants who themselves are placed in a unique situation quite unknown in pre-colonial times. Finally, if and when our hypothetical tribesman does return to his home district, it is with a totally new world-view. In all probability his cash wealth exceeds that possessed by his headman, or even chief, especially if he has worked in the European sector for any length of time.

Many situations are recorded which demonstrate the degree to which Africans have adapted to changed conditions, one which is summarized below. This example involves a divorce suit brought by a Barotse woman against her husband who had been away at the mines for what she considered an excessively long period of time. The kinsmen of the defendant argued on his behalf that he had sent her money and blankets all this time, and had in every way been a

good provider. The court held: " . . . that this woman did not marry a blanket . . ." and granted the divorce. Shortly, however, the husband returned. Whereupon, wanting his wife back, and she wanting him, her father demanded a second marriage payment for what was after all a new marriage. The husband thereupon appealed to the court to reverse their previous order granting the divorce, which they did, revising an earlier rule on the matter. That rule had stated that a woman was entitled to sue for divorce if her husband remained absent for a period in excess of two years at any one time. The court now interpreted the rule to mean that the husband should leave his place of employment at the end of a two year absence, if he wished to avoid the consequences of a long separation from his spouse. In this way good morals and public policy could be maintained, as the initial purpose of the law was to preserve marriages, not to destroy them.[19]

The problem of administering justice among recently urbanized Africans, especially those working in the mines, is well illustrated in the approach used on the Northern Rhodesian Copperbelt. In 1938 the British administration then ruling the territory set up the first Urban Native courts. These were made up of elders from the various tribes represented at the mines, who were appointed by their chiefs. They served for two consecutive three year terms

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[19] Max Gluckman, Order and Rebellion in Tribal Africa, p. 200.

with a six month leave period in between. After this time they were required to resign. The court President, however, was appointed for his experience and wisdom, for life, during good behavior. While the British ruled Northern Rhodesia, these courts followed customary procedures, parties being permitted to tell their story " . . . unrestrained by European rules of evidence." There is no indication as yet, that this principle has in any way been altered since Independence. In the matter of sentencing, however, the influence of Anglo-law has been noticeable. Under customary law there was rarely any provision made for imprisonment of offenders, and punishment normally took the form of compensation rather than retribution. Now (1957), "Fine or imprisonment is nearly always inflicted in addition to, or sometimes instead of compensation." Whereas formerly the theft of, for example, a chicken, would result in the defendant being ordered to pay the plaintiff two chickens or ten shillings (the market value of two chickens, about $1.40), now he might be ordered to pay the court half of that money in the form of a fine, whilst giving the plaintiff the remainder as compensation.[20]

Despite all the evidence to the contrary, some historians and legal scholars, have insisted that African law is not true law, but merely custom, as though that were an inherent fault. One of the

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[20] R. L. Moffat, "African Courts and Native Customary Law in Urban Areas of Northern Rhodesia," Journal of African Administration, IX (April 1957), pp. 71-79. All quotations are cited from this article.

major premises upon which this misconception is built, is that the African supposedly makes no distinction between criminal and civil torts (wrongs). This erroneous impression has been attributed to four major influences:

1) The writings of Sir Henry Maine (Ancient Law and other works.)
2) Awareness on the part of historical writers of the evolution of the law in Europe.
3) The fallacy that criminal and civil law are always clear-cut concepts in European terms.
4) The imputation that African law, because it is African, must necessarily be different.[21]

One often reads the dictum ". . . all blood belongs to the chief," which put another way simply means: crimes resulting in the death of a subject, whether accidental or intentional, are wrongs committed against the chief. He is the one who suffers most as a result of the loss of manpower, and as the symbol of authority in a tribal system, he is closely analogous to the state in our terms. Thus it is the chief who receives compensation on the death of a subject, if the cause is a criminal one. This is only a short step in conception from the Anglo-American system of law, in which the state prosecutes crimes and the individual prosecutes civil wrongs. The fact that many Bantu peoples have recognized this distinction without necessarily institutionalizing it is illustrated well in the following quotation:

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[21] Elias, p. 110.

> The great principle of the Kafir law, which though merely a traditional record of precedents, is tolerably clear and systematic, seems to be that a man's property is his own, but that his person is the Chief's.[22]

It should hardly be necessary to add that our own common law is "merely a traditional record of precedents," albeit a written one; but which in other respects differs little from that of most Bantu societies.

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[22] Thomas Baines, Journal of Residence in Africa 1842-1853, ed R. F. Kennedy (Cape Town: Van Riebeeck Society, 1961), p. 48.

V: THE STATUS OF LAW IN BANTU AFRICA TODAY

Writing from so great a distance and without the benefit of on-the-spot investigations, it is extremely difficult to discuss this topic with any assurance. There are, however, certain observable trends.

In the first place, it is very clear that the traditional law of the people considered most closely no longer functions in quite the same way as described in the second chapter. That is not to say it is not a vital force. The African does not appear to have lost his interest in or desire for protracted discussion which was suggested earlier as a basis for litigation. But the courts do not function in quite the same way as they once did. For years now men and women have been traveling to Europe and North America in search of an education. Many of these have studied the law, and later returned to their homes to practice as lawyers, advocates, and judges. This process, though a part of colonial policy, would probably have happened anyway, possibly more vigorously in the absence of colonialism. However, whatever motivated this exodus in search of learning, it has and continues to have a profound effect. The inevitable result has been the introduction of new procedures to the legal machinery, and a considerably expanded world-view for the people of Africa. At the same

time the advent of colonialism itself introduced, sometimes forcibly, new concepts of the law and new methods of application. The colonists not only introduced new laws, but in changing the whole economy and life-style of the peoples whom they colonized, introduced new needs for the law both in terms of administration, requiring new and strange procedures, and in substance. The effect of this was not all negative. As has been shown, such matters as witch-murder, polygamy, bride-wealth, were subject to review, sometimes with drastic thoroughness, which caused considerable alarm and dismay among the rural people especially. Yet on the other hand, the rising aspirations of the younger people for the goods and amenities that their European conquerors enjoyed caused them to move to the towns in vast numbers, and created many new problems of a legal nature which somehow have had to be solved. It may be argued that this too was a primarily negative result of colonization. Be that as it may, the need for new rules and devices unknown and unnecessary in traditional Africa has become unquestionable.

But what of colonial law itself? In some respects its fate has not been dissimilar. Now that one can look back on the colonial period as a matter of history (noting of course, that such territories as Rhodesia, South Africa, and the Portuguese possessions of Angola and Mozambique are still under colonial domination, at least if viewed through the eyes of the African people themselves), it is possible to

make an assessment of the functioning of its remnants both in the territories named above as well as those whose independence is recognized.

First, with regard to procedures it is clear that the strong influence of European legal procedures has persisted. No independent Bantu state has banished lawyers, advocates, magistrates, judges, clerks or the other various appendages of a professional judical system from their administrations. In fact, even the traditional garb of wigs and judicial robes which always seemed so very stifling in the sub-tropical heat are still donned, though now the head under them is in all probability black, not white. Thus, too, the administration of an oath prior to the giving of evidence is continued. Perjury is punishable and hearsay evidence is no longer admitted. Most important, by the very fact that a two-tier system of law still operates in such territories as Zambia, by which de-tribalized urban Africans and Europeans may choose to be tried according to one set of rules, namely the British Common Law, and rural or tribal Africans may choose to be judged by their own traditional codes of justice, indicates that the imposed British colonial law is held in some esteem.

On the other hand, there are the substantive aspects of the law which refer to what the law does as opposed to the way it does it.

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[1] Thomas, p. 471-477.

By now it should be apparent that the emerged Bantu African states, both those under African rule as well as those under white domination and especially the latter, are in the technological sense very much a part of the twentieth century. Whether they like it or not, the cash economy has permeated the whole African continent. None, except maybe a few wandering bushmen in the northern Kalahari, are exempt from its influence or unaffected by its power. Thus most Bantu Africans, like their counterparts the world over, work for renumeration in cash and as such are subject to most of the same economic pressures. This new status, welcome or not, is unavoidable. And it carries with it many new responsibilities, or perhaps one should say a change in responsibility. No longer is the extended family, where three or more generations lived in close proximity to one another, a viable unit. The two generation family of European origin has taken its place. This has developed a new sense of identity and individualism carrying with it the concept of individual liability in terms of the law, a relatively new concept in Bantu Africa. No longer can it be said: "Owing to their collective, notions, the Bantu's consider relatives as responsible for the debts of their own kin . . . ," and the law no longer automatically recognizes this claim.[2] For better or for worse, the individual Bantu, whether he lives in the town or the country, whether he has maintained ties with his family or tribe or

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[2] Junod, p. 437.

rejected both, has now, more than ever before to stand on his own. This is not to say that new institutions have not arisen to take the place of the family; they have. Most notable of these has been the formation of political parties and trade unions on the Western European pattern. But these associations are not the same. They are, in the first place, freely entered and freely left, and they offer a less certain type of security than the family once did. At the same time the African who is exposed to this new situation experiences a shift in loyalty. No longer does he look to his father, headman, or chief for guidance in political, social or legal matters, but now to his foreman, union leader, or employer. Not only does his loyalty spectrum change, but at the same time so may his financial wealth and, therefore, his status as well.

It has been said of primitive society that "law is generally linked with religion and political power." In developed society, however, this is seldom the case. Thus, as the "African becomes more Europeanized so his political, social, and legal structures change." Church and state are separated, and wealth no longer centers on the traditional leaders; but in fact mechanics, shopkeepers, and factory workers will outstrip their chiefs in terms of monetary wealth.[3] So that in time the African's identification with his chief

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[3] Godfrey and Monica Wilson, The Analysis of Social Change (Cambridge: Cambridge University Press, 1965), pp. 6-7.

and his chief's law diminishes, while at the same time he comes to identify more and more with the new laws and mores that are more relevant to him in his changed circumstances.

At this point it is well not to lose sight of the fact that, as one commentator has put it " . . . the ultimate purpose of the law in a society, be it African or European, is to secure order and regularity in the conduct of human affairs and to ensure the stability of the body politic."[4] In other words it is not the function or purpose of the law which has undergone change, but rather the means by which the people of Bantu Africa seek to use the law. It would now seem reasonable to suggest that both the traditional and the colonial law of Bantu Africa have undergone change. These changes both in procedure and substance are given rise to a new but so far incomplete legal system. Just as in South Africa for instance, the development of an Anglo-Roman-Dutch law has been observed, so too in Zambia, one can see that an Anglo-Zambian-Common law is developing. But the process is slow, and not always sure. The evidence of earlier chapters would suggest that in South Africa, for instance, the law is being used as a means of perpetuating apartheid, not only through statutes which are obvious, but also through the far more insidious procedure of maintaining a deliberately pluralistic system, in this way ensuring for all time separation of the laws (customary Bantu from European

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[4]Elias, p. 268.

introduced), which at the same time guarantees that they will be unequal.[5] On the other side of the coin is Zambia. There, too, a pluralistic system is operated, recognizing both customary law and procedures and the European introduced law. The difference is in the ultimate authority which rests with the appeal courts, common to all jurisdictions. (That is to say an appeal from any court, be it customary or European, will be channeled through the appellate division, as compared to South Africa where separate jurisdictions for customary and European cases are maintained.) There is no doubt that this procedure is fraught with pitfalls, some of which have already been highlighted.[6] But there is reason to expect that these problems will in time be ameliorated.

> Common-law willingness to accomodate corporations (corporate-bodies other than the state) allowed the British to deal freely with tribal units whose forms and boundaries they could identify . . . [because] British law explicitly provides legal recognition for autonomous corporations.[7]

So that while dualism or parallelism in the legal systems of Africa still persists, there is no reason why in time these should not vanish leaving in their wake a new, dynamic, unified and peculiarly African

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[5] R. S. Suttner, "Legal Pluralism in South Africa," The International and Comparative Law Quarterly XIX part 1 (January 1970) pp. 134-153.

[6] Thomas, pp. 471-477.

[7] M. G. Smith, "The Sociological Framework of Law," in Leo and Hilda Kuper, eds. African Law (Berkeley: University of California Press, 1965), pp. 46-47.

system of law.[8] Some commentators would even argue that this has already happened. It has been suggested that:

> All laws in independent Africa are now 'African', and African law no longer means simply indigenous customary laws deriving from antiquity, but the modern statutory laws as well . . .[9]

Such is no doubt a reasonable proposition. Our concern, however, is not only with the independent African states, but also with those that are under what amounts to a colonial regime. Thus it cannot yet be said of the Bantu African Law that it is all Bantu. Not only is it not all Bantu, it may never be. However, there is little doubt that whatever emerges in time, it will have more than the appearance of Bantu about it.

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[8] Allott, "The Future of African Law," African Law, p. 223.

[9] Ibid., p. 218.

VI: CONCLUSIONS

Probably the most fruitful way to view the traditional law of Bantu Africa is as a stage in the evolution of law. For the law, like the society it controls, is never static. New needs and innovations demand new controls and methods of control. The introduction of a cash economy, of goods and consumer products undreamed of in another age, or religious teaching and a different vision of life, inevitably cause enormous upheaval to any traditional society with which they come in contact. This is true of the European influence on Bantu society no less than any other. The measure, therefore, of a society's vigour and its right to be regarded as socially developed, which by implication means legally developed too, should be determined by its adaptability to the new conditions imposed upon it, rather than by some subjective assessment of what its traditional law is. Limited though the evidence here presented is, it should nontheless support the premise that Bantu society was in a sense developed prior to the European occupation. It has managed to adapt to those concepts of the introduced law most pertinent to its needs, while at the same time preserving its own customary laws where they are still viable. What the future holds for the traditional law

of the Bantu, only a soothsayer could predict. One thing is certain, however; it has so far demonstrated remarkable resilience, and whatever form finally emerges, it will have more than a mere smattering of tradition about it.

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